

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 42367
Docket No. MW-42512
16-3-NRAB-00003-140141

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(BNSF Railway Company (former Burlington
(Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Machine Operator G. Hagen by letter dated December 13, 2012 for his alleged violation of BNSF Railway Policy on the use of Alcohol and Drugs dated April 15, 2009 and MOWOR 1.5 Drugs and Alcohol in connection with his alleged positive Drug and Alcohol test as a result of follow-up testing on November 15, 2012 while assigned as a machine operator on TMOX0425 was excessive, without merit and in violation of the Agreement (System File C-13-D070-3/10-13-0190 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant G. Hagen shall now “*** be immediately returned to service in accordance with Rule 40 of the current Agreement being made whole for all his losses and benefits.***”

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On November 15, 2012, Claimant Hagen was randomly selected to be tested for drugs and alcohol. The test revealed a blood alcohol content of .023%. The confirmation test registered a .022% blood alcohol content. This was the Claimant's second positive test for drugs or alcohol. His prior positive test was on April 18, 2010, after which he enrolled in the Employee Assistance Program and completed the treatment program on June 14, 2011. At that time, he signed a document acknowledging that a second violation of the Policy on the Use of Alcohol and Drugs could result in job loss. During the investigation hearing, the Claimant admitted he had violated BNSF's Policy. Since this was his second violation, the Carrier dismissed him.

It is the position of the Carrier, the Claimant violated BNSF Policy on the use of Alcohol and Drugs which specifically prohibits reporting for duty or on property with a blood or breath-alcohol concentration greater than or equal to 0.02%. The Organization offered no reliable or medical evidence to support its mouth alcohol theory. Senior Medical Specialist Cheryl Kimbriel is trained and certified in the administration of the breath alcohol test. She testified that she was aware of mouth alcohol resulting in a false positive, but explained that the result cannot be repeated after waiting 15 minutes and retesting, as was done here. Mouth alcohol dissipates within that time frame, she said, so the results are probative of alcohol in the system.

The Organization argues nothing in the record makes Kimbriel a medical expert witness on production or dissipation of mouth alcohol. Her testimony was inadequate to establish a preponderance of evidence. It is unrefuted that the Claimant suffered from and was treated for acid reflux; this contributed to his inaccurate test result. The confirmatory test was lower than the initial test result, indicating "mouth alcohol." His dentures exacerbated the likelihood of "mouth alcohol."

The Board has carefully reviewed the arguments and though Kimbriel is not a physician, she is an expert in administration of the breath alcohol test. She was aware of the phenomenon of false positives due to mouth alcohol and retested 15 minutes later to ensure a valid test. There was no creditable testimony that mouth alcohol could endure for more than 15 minutes. As a result, the Carrier has substantial evidence that the Claimant had a blood alcohol level in excess of the permissible limit.

MOWOR 1.5 states: "The use of possession of alcoholic beverages while on duty or on company property is prohibited. Employees must not have any measurable alcohol in their breath or in their bodily fluids when reporting for duty, while on duty, or while on company property." The Carrier's evidence supports its conclusion that the Claimant was in violation of this rule. Given the fact that he was already under an agreement requiring him to be alcohol free, the dismissal must be upheld.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 30th day of August 2016.